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Retention of Medical Records

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Because medical records are essential to defend against future malpractice claims, the statute of limitations and court decisions impacting on this statute must be considered before records are destroyed. The prudent practitioner will retain records in commercial "dead storage" or on microfilm indefinitely. In California, minimum time for retention would be seven years after the last date of treatment or after the patient reached majority, whichever occurs last; even ten years after either event presents some appreciable risks.

QUESTIONS OFTEN ARISE as to the length of time physicians should retain medical records. Records should, of course, be kept as long as they may be useful in rendering treatment. This includes retaining records to provide for continuity of care and to answer a patient's questions years after conclusion of treatment. Routine questions regarding child immunizations, evidence of a physical condition existing before an injury or test results from previous years may be anticipated and records retained accordingly. Today's scientific advances suggest that a physician retain records indefinitely to provide answers to unforeseeable questions. In 1980 physicians are receiving requests from women seeking to determine if their mothers were treated with diethylstilbestrol (DES) in the late 1940's. A need for this information could not have been anticipated 30 years ago.

Legal considerations also dictate that patients' records be retained in some cases for an indefinite

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period. This article will review pertinent California statutes and case law affecting medical record retention and offer some practical considerations concerning possible future medical malpractice actions. The term *medical records* covers all of a patient's records including x-ray films, electrocardiographic tapes, and the like.

California law includes two requirements for retention of medical records: (1) California hospitals are required by regulation to retain medical records for seven years following a patient's discharge, except for the records of minors which must be retained at least one year after a minor patient has reached 18 years of age and in no case less than seven years. (2) Physicians and hospitals treating Medi-Cal patients must retain the patient's records for three years from the date the last service was rendered. There are no California statutes that specify the period a physician must retain private records for patients not covered by the Medi-Cal Act. However, since records are essential to defend against future malpractice claims, prudent physicians will consider the current statute of limitations, and recent court decisions impacting on this statute, before destroying any medical records.

Statutes of limitation provide that suit cannot be brought after a specified period has passed. Simply put, records should be retained until the statutory period is over, plus an additional period during which suit may be served upon any party. Judicially created exceptions to the statutory provisions make these calculations difficult.

The statute of limitations in California for actions based on the professional negligence of a physician requires a plaintiff to bring an action within "three years after the date of injury or *one year* after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the injury, whichever first occurs." (Code of Civil Procedure §340.5.) This three-year period may be extended indefinitely should there be any act of fraud or concealment on the part of the physician or the leaving of a foreign body in the injured person. An action must be commenced on behalf of a minor under six within three years of the alleged wrongful act or before his or her eighth birthday, whichever provides a longer period. Fraud or collusion between the parents and the physician will extend the statute. For prenatal injuries, California law provides for a six-year statute of limitations from the date of birth. (Civil Code §29.) If the patient has certain disabilities, such as insanity, all applicable statutes of limitation are extended. (Code of Civil Procedure §352.)

In addition to these exceptions, recent court decisions in California have substantially weakened the protection of the three-year bar. A 1978 appellate decision declared that each case must turn on its own particular facts for determination of the date of injury. The court held that the statute starts to run when "appreciable harm" is first manifested. Another case held that the "injury" does not occur until the patient suffers physical injury and learns of its alleged negligent or wrongful cause. Such interpretations render the three-year statute of limitations almost meaningless. In a 1978 case the appellate court held that a physician be held liable for failure to warn of the dangers of an intrauterine device (IUD) implanted six years earlier. The statute of limitations began running on the discovery of the harm, six years after the implantation. This physician would need to search for records six to seven years old for a recorded notation that the patient had been warned of the dangers. As this example illustrates, claims can conceivably be filed years after the incident in question.

Records will be needed to defend these claims, even if they are infrequent. Therefore, it would be wise to retain medical records indefinitely. In California, the absolute minimum would be seven years after the last date of treatment or after the patient reaches majority (whichever occurs last); even ten years after that event presents some appreciable risks.

Records should also be retained after a claim for malpractice has been paid. California law requires an uninsured physician or a physician's professional liability insurance carrier to send a complete report to the Board of Medical Quality Assurance of any settlement or award over $30,000 for damages for death or personal injury caused by the physician's professional negligence. Every person named in such report, who is notified by the board within 60 days of the filing of the report, is required to retain for a period of three years from the filing of such report any records as to the matter in question.

Even after a physician's death, patients' medical records should be retained. In California, plaintiffs with suits pending at the time of a physician's death have four months after first

publication of Notice to Creditors to file claims with the estate. (Probate Code §707.) This time may be extended if the court finds that neither the claimant nor his attorney had knowledge of the decedent's death at the time prescribed for presenting the claim. For personal injury claims not previously filed claimants must file within one year after accrual of the cause of action. (Probate Code §720.) There is a special provision for suing the decedent's insurance carrier if the suit is based on a claim for which the decedent was protected by liability insurance. (Probate Code §721.) To assist the carrier in defending an action against a deceased physician, it is prudent for the estate to retain the medical records of patients until the three-year statute of limitations has expired. At the time the deceased physician's estate is to be closed, the executor or administrator should discuss record retention with the liability insurance carrier.

When a physician moves from a community or retires from practice he or she should notify patients on the active list of this intention and encourage them to find another physician. With the patient's consent, records may then be transferred to the new physician. The original records, however, should be retained by the retiring or moving physician to protect against any future malpractice claims. A reasonable charge for duplicating or secretarial services connected with transfer is not improper.

Medical records to be retained indefinitely may be placed in "dead storage" in a commercial van and storage company. To reduce space requirements and facilitate the location of records, such records may be microfilmed. Microfilmed records are admissible as evidence in court if made in the "regular course of business." If not copied as part of the business routine, the microfilmed records will be admissible if a "certification" is attached to the sealed film container or incorporated in the film itself, certifying that the copy is correct and stating the date and name of the person copying the records. (Evidence Code §§1531, 1550, 1551.)

Finally, if records are eventually destroyed, every precaution should be taken to protect the privileged information contained therein. Shredding or burning these documents will insure that confidentiality is maintained. Moreover, a report should be kept of the date and name of the person or organization doing the destruction as well as a list of the names of the patients whose records were destroyed.

Conclusion

It is recommended that a patient's medical records be retained indefinitely due to malpractice considerations, as well as to aid in future treatment by the physician or subsequent treating physicians. Records may be maintained economically in commercial "dead storage," or, if the physician chooses, kept on microfilm.